Debunking Arbitration, Mediation Myths in Health Care Litigation

Kate McGrath, Esquire
Published on April 11, 2017 in Medical Malpractice Supplement of The Legal Intelligencer

In my 25 years as a trial lawyer, I have often heard the same comments from attorneys and clients on the efficacy of mediation and/or arbitration in the resolution of litigation. Regarding mediation, I have often heard that no one is ever satisfied with the results of a mediation. Regarding arbitration, the mantra has been: At arbitration, the arbitrator "splits the baby" in an effort to keep all the parties happy. In this article, I would like to debunk these "myths" by highlighting some of my experiences as a trial attorney for the defense in both mediation and arbitration.

First, however, I would like to explain what I view the role of a defense attorney to be especially in the setting of health care litigation. I have always believed that my role in this area is to be a facilitator for resolution. The defense attorney must look at a case honestly and with the advice of experts determine whether the case is defensible or not. That determination puts the matter on a course to advance resolution. In cases where jury trials were not optimal for resolution, I always considered mediation as a vehicle for resolution. However, my clients often initially rejected that path because of a sense that we were giving away the case.

It was therefore my task to educate my clients on the positive aspects of mediation. When the sympathies of the case were clearly with the plaintiff and the defendant had exposure, I worked to persuade my clients that we could retain a mediator chosen and respected by both sides. The work of the mediator was to enhance the dialogue and hopefully bring the parties together. A

skilled mediator is able to do this through honest communication focusing on the strengths and weaknesses of all involved.

One striking and memorable example for me was a very difficult case involving the death of a young man at an acute care facility. After conversing with my client during several discussions, the client eventually agreed to the concept. While not being totally "on board," I did nonetheless receive authority to pursue mediation. Thereafter, the plaintiffs attorney and I agreed to a mediator who proved to be excellent in all respects.

A representative of the hospital attended the mediation. Despite the fact that the plaintiffs attorney made an opening statement in the form of a tirade against the hospital, the mediator brought him under control. The day proceeded more positively with the mediator working with each side by listening and making suggestions. While we made progress, it was clear that we needed another day to make more progress.

My client did not attend the second day. One of the conditions that the plaintiffs themselves presented to the mediator was that they receive a formal verbal apology from the hospital. We were very close on the numbers at that point. After contacting my client and receiving authority, I agreed to make the formal apology to the parents of the young man. The hospital also suggested that we offer to plant a tree in their son's memory on the hospital grounds.

I made a heartfelt apology to the parents on behalf of the hospital. I also suggested that we plant a tree in their son's memory. Thereafter, the parents advised their attorney and the mediator that they would accept the hospital's offer of settlement. We could never have accomplished this in any other setting. In this case, the mediator had listened closely to the parents, sensed their emotional needs and directed the discussions. At the end of the day all parties were "satisfied" with the result and very grateful to our skilled mediator for all of his efforts to bring the mediation to a needed resolution. While I have been involved in many successful mediations, this was the most memorable for me. Even though some mediations do not settle at the first attempt, there is still value in the process. The process itself provides a vehicle for communication that other forums and settings such as conference calls, letters and judicial settings do not. The mediation provides an exchange of information that will facilitate the eventual resolution. There should be a measure of satisfaction in that.

Because I represented many physicians, I regularly suggested the idea of a binding arbitration for them. Initially, the response was always the same: "I will not get a fair shot because the arbitrator will "split the baby." It would often require many conversations with my client to convince him that a binding arbitration could work on many levels.

In addition to mutually agreeing on the arbitrator, the parties generally set the rules regarding fact witnesses, expert witnesses and testimony in general. There could also be a "high/low" in place without the arbitrator's knowledge. This would guarantee a payment to the plaintiff in the event of a defense verdict. This payment would not be reported to the National Practitioners Data Bank. This is a major positive factor for a physician. In a case that involved complicated medicine, we could have an arbitrator who seriously studied the medicine and the expert reports. A studied arbitrator has a commitment to equal justice with sensitivity, intelligence and integrity without being susceptible to manipulation. Additionally, the arbitration of a complicated healthcare case can be completed in one day. Instead of spending five to 10 days out of a

practice and in the courtroom, we can conclude the process in one day. Once a defendant is apprised of the benefits of an arbitration, he or she usually agrees. My clients have been involved in many binding arbitrations. I have never experienced an arbitrator who "split the baby."

One example of a complicated and difficult arbitration involved the case of a young husband and father who lost his hearing following an intricate and tedious surgery. The plaintiff maintained that the surgery was performed negligently thus causing his hearing loss. Because the arbitration forum allowed for predictability with guaranteed amounts and certainty that the Doctors personal assets were not implicated, all parties agreed to this forum. The mutually agreed upon arbitrator studied the opinions presented by both experts and listened carefully to their testimony both on direct and cross examination. He also paid close attention to the testimony of the defendant surgeon. I believe the arbitrator had a much firmer grasp of the complicated ear surgery than jurors would have had. He also understood the plaintiff's difficult health situation.

The arbitrator issued his confidential decision which brought not only finality to the case, it also brought a good measure of satisfaction to the parties.

During the course of my years as a trial attorney, my clients have been dismissed from cases, had successful jury trials and have settled cases. When we used the vehicles of either mediation or arbitration, my clients were uniformly satisfied and convinced of the fairness of these processes.

In conclusion, the choice of a mediator or arbitrator is critical to the success of the process. A good mediator must be fair, attentive and able to communicate with all parties. A good mediator must also be able to manage the expectation of all parties. •

Kate McGrath began her career as a trial lawyer for Marshall Dennehey Warner Coleman and Goggin in June, 1989 after graduating from Villanova University School of Law. She was admitted to the Supreme Court of Pennsylvania that November. During her 25 years, she has had many trials, mediations and arbitrations. She was also a court appointed arbitrator for the Montgomery County Court of Common Pleas. Kate is available to utilize her experience towards the mediation and arbitration field. For more information or to schedule a case with Kate, please contact Maggy Carney at mcarney@adroptions.com 215-564-1775.